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NO. 84-320

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1984

NATIONAL FARMERS UNION INSURANCE COMPANIES; and LODGE GRASS SCHOOL DISTRICT NO. 27,

Petitioners,

-v-

CROW TRIBE OF INDIANS: LEROY SAGE, a minor; FLORA NOT AFRAID, his guardian; THE TRIBAL COURT OF THE CROW INDIAN RESERVATION: EDDIE ROUNDFACE, GLEN BIRDINGROUND, and IRA LEFT HAND, Judges of the Tribal Court of the Crow Indian Reservation; CROW INDIAN TRIBAL COUNCIL; and DONALD STUART, Chairman of the Crow Indian Tribal Council,

Respondents.

BRIEF OF NINE AMICI CURIAE STATES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED BY THE PETITION FOR WRIT OF CERTIORARI

1. Whether there is a federal claim for relief against Indian tribal governments that unlawfully assert civil jurisdiction over non-Indians.

2. Whether the Tribal Court of the Crow Indian Reservation has jurisdiction over claims that involve the State of Montana (or its subdivisions), that arise on state-owned land, and that occur in connection with activities that are compelled or encouraged by state and federal law or policy.

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BRIEF OF NINE AMICI CURIAE STATES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The states of Arizona, Montana, Minnesota, North Carolina, North Dakota, Oklahoma, South Dakota, Wisconsin and Wyoming as amici curiae respectfully submit a brief in support of the Petition for Writ of Certiorari in this matter.

STATEMENT OF INTEREST

The amici curiae states appear through their respective attorneys general. See Sup. Ct. R. 36.4. Each amicus state has at least one and, in most instances, several Indian reservations within its boundaries. With the exception of Minnesota and Wisconsin, none has been granted civil jurisdiction over such reservations under 25 U.S.C. § 1322(a) (1983) or previously assumed such jurisdiction under section 6 of

Public Law No. 83-280, 67 Stat. 588, 590 (1953). In all amici states except North Carolina and Wyoming, tribes have developed their own adjudicatory systems which have superseded Courts of Indian Offenses, apply tribal codes and common law and are generally administered by lay judges. See generally R. Strickland, Cohen's Handbook of Federal Indian Law 251 (1982 ed.); V. Deloria & C. Lytle, American Indians, American Justice 116-25 (1983); 25 C.F.R. § 11.1(d) (1984).

Although the Indian reservations within the amici states have many incidents of self-government, there is necessarily a substantial degree of interchange within exterior reservation boundaries between the states, tribes and tribal members. Such interchange occurs on fee lands owned by the state or nontribal members and on lands owned in

fee by tribal members or held in trust for the tribe by the United States government; the interchange normally arises from the performance of uniquely governmental functions, such as provision of educational or social services and the construction, maintenance and regulation of highways. The degree of interaction between the amici states, or their political subdivisions, and the tribes is clearly greater than that of any other person except the federal government. Concomitant with such interchange is, as in this case, an increased opportunity for involuntary involvement in tribal civil adjudicatory proceedings.

Protection of the amici states' varied interests requires the availability of a federal forum to determine whether the exercise of tribal civil adjudication jurisdiction has

exceeded the scope of the tribe's federally-defined sovereignty rights. Ready access to such a forum exists only if original jurisdiction before United States district courts is present under 28 U.S.C. § 1331 (1966). This brief will thus be limited to discussion of the first question presented by the petition for writ of certiorari herein.

ARGUMENT

I. THE CIVIL ADJUDICATORY JURISDICTION OF INDIAN TRIBES IS A MATTER OF GREAT IMPORTANCE TO THE AMICI STATES WHICH HAVE SUBSTANTIAL GOVERNMENTAL RELATIONSHIPS WITH TRIBAL MEMBERS AND THE TRIBES THEMSELVES.

Under section 16 of the Crow Allotment Act of 1920, Pub. L. No. 66-230, § 16, 41 Stat. 751, 756-57, the State of Montana was granted land within the Crow Reservation for "common school purposes;" the grant was in fee and on the condition that tribal youth "be permitted to attend the public schools of

[Montana] on the same condition as children of white citizens of said state." The facility in question presently is located on such land. Petitioner Lodge Grass School District No. 27 is, however, only one of 26 Montana school districts which have elementary or secondary schools on state-owned land within the exterior boundaries of the seven reservations in that state.[1/] These facilities provide

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[1/] See, e.g., Pub. L. No. 59-154, 34 Stat. 1015, 1036 (1907) (grant of lands on Blackfeet Reservation to Montana for school purposes); Pub. L. No. 65-159, 40 Stat. 561, 574 (1918) (conveyance of land at Bighorn, Montana on Crow Reservation to Montana for school purposes on condition that Indian children within district be permitted to attend school on equal basis with white children); Pub. L. No. 66-375, § 7, 41 Stat. 1355, 1359 (1921) (grant of land to Montana for school purposes on Fort Belknap Reservation); Pub. L. No. 66-169, 41 Stat. 549 (1920) (grant of land to Montana for school purposes on Fort Peck Reservation); Pub. L. No. 58-159, § 8, 35

educational services primarily to Indian youth. Aside from those activities occurring at the school facilities, the districts offer related services such as bus transportation to and from students' homes for daily classes and extracurricular activities; such transportation may consequently involve operation of school district vehicles wholly within or partially without the reservations. State and county funding for the facilities located within reservations will, for the 1983-1984

(Footnote continued)
Stat. 302, 303-04 (1904) (grant of land to Montana on Flathead Reservation for school purposes); Pub. L. No. 65-246 1/2, 40 Stat. 1053 (1919) (grant of land to Missoula County on Flathead Reservation for school purposes); Pub. L. No. 69-330, § 4, 44 Stat. 690, 691-92 (1926) (authority to Secretary of Interior to set aside and issue patents for land at Lame Deer, Montana on Northern Cheyenne Reservation for school sites).

fiscal year, be approximately 21.8 million dollars.[2/] The operation of these school districts thus materially differs from that in Ramah Navajo School Board v. Bureau of Revenue, 458 U.S. 832 (1982), where the involved facility was operated by a school board formed pursuant to the Navajo Tribal Code and received no state financial assistance.

Under Pub. L. No. 63-310, 38 Stat. 1188 (1915), Montana was given authority to establish roads within reservations following approval by the affected reservation's superintendent. Montana

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2/ There are 17 Montana school districts maintaining elementary or secondary schools in locations which, although not within the exterior boundaries of an Indian reservation, border on the reservation and serve many Indian youth. Transportation is provided to these students and, which, like that offered by on-reservation schools, occurs both within and without the reservation.

and other amici states were extended similar authority, upon permission by the Secretary of the Interior, under 25 U.S.C. § 311 (1983). See 25 C.F.R. § 169.28. Implicit under Pub. L. No. 63-310 and express under the Secretary's regulations implementing 25 U.S.C. § 311 is the states' duty to maintain highways once established. See 25 C.F.R. § 169.5(a). Use of the granted easement is, moreover, governed by state law. United States v. Oklahoma Gas & Electric, 318 U.S. 206, 210 (1943). Thus, although the Ninth Circuit has observed in dicta that tribal members may not, within their particular reservations, be subject to enforcement of state traffic laws by state officers except as provided under 18 U.S.C. § 1162 (1966), all other persons unquestionably are. United States v. Harvey, 701 F.2d 800, 805

(1983). The amici states accordingly have a substantial presence on many reservations through highway construction, maintenance and law enforcement activities, with the attendant possibility of litigation over, inter alia, tortious conduct by their employees.

While this description of the interaction between state government and tribes or their members has focused on educational and highway matters in Montana, a similar relationship exists in the other amici states in these and other areas. The breadth and regularity of intergovernmental contacts are presently significant because they create the possibility, indeed the likelihood, of tribal civil adjudicatory proceedings over issues such as the personal injury herein and for attempted execution upon

state property located within reservations. It is also clear that, since the amici states' activities occur within the exterior boundaries of the reservations on both state-owned and trust lands and will frequently involve contact between nontribal employees and tribal members, substantial jurisdictional questions may arise in these tribal proceedings. The immediate effect of the Court of Appeals' decision below is, in a civil adjudicatory context, to permit tribes through internal legislation and their courts through judicial construction or common law development to define the scope of their civil jurisdiction without the opportunity for federal court review at the instance of the nonconsenting

party.[3/] A probable secondary effect of the decision will be creation by each tribe of differing jurisdictional standards whose reach will be unlimited by federal law.[4/]

II. THE SCOPE OF TRIBAL SOVEREIGNTY HAS TRADITIONALLY BEEN A MATTER DETERMINED WITH REFERENCE TO FEDERAL PRINCIPLES. A FEDERAL FORUM IS

[3/] While state court and, eventually, this Court's review could occur through a collateral action initiated by the party prevailing in the tribal proceeding, the nonprevailing party has no recourse with respect to enforcement of a final tribal court judgment as to on-reservation property. The possibility of collateral review is thus beyond the control of the party challenging the tribal court's jurisdiction. Because many amici states have substantial property within the reservations upon which execution may be made, the absence of independent review of jurisdiction issues is especially significant.

[4/] It must be emphasized that, for present purposes, the amici states' concern is not that tribal courts will rule in a biased manner but that neither tribes nor their courts will have any restraints upon them in fashioning and applying jurisdictional standards.

THEREFORE ESSENTIAL TO ESTABLISHING A CONSISTENT APPLICATION OF SOVEREIGNTY PRINCIPLES WITH RESPECT TO THE PERMISSIBLE RANGE OF TRIBAL CIVIL ADJUDICATORY JURISDICTION.

Federal jurisdiction was not questioned below by the respondents. Relying on City of Milwaukee v. Illinois, 451 U.S. 304 (1981), the Court of Appeals nonetheless refused to invoke the federal common law doctrine as basis for jurisdiction under 28 U.S.C. § 1331.[5/]

[5/] In City of Milwaukee the Court held that the federal common law doctrine could not serve as basis for an action by a state to enjoin, as a public nuisance, the discharge of inadequately treated sewage into Lake Michigan by a municipality of another state. The holding was premised on enactment of the 1972 Amendments to the Federal Water Pollution Control Act, Pub. L. No. 92-500, 86 Stat. 816, which "occupied the field [of water pollution control] through the establishment of a comprehensive regulatory program supervised by an expert administrative agency." 451 U.S. at 317. City of Milwaukee is thus factually and legally inapposite to this matter.

However, federal common law has been developed when "a federal rule of decision is 'necessary to protect uniquely federal interests.'..." Texas Industries v. Radcliffe Materials, 451 U.S. 630, 640 (1981). The federal common law concept has, moreover, been used when, in its absence, nonfederal tribunals would be "left free to formulate their own rules" concerning a doctrine of particularly federal interest, with the result that "the purposes behind the doctrine would be as effectively undermined as if there had been no federal pronouncement on the subject." Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 424 (1964). That Indian law generally and, more specifically, the scope of tribal sovereignty have been areas of exclusive federal regulation cannot be disputed.

See Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974) (sustaining 28 U.S.C. §§ 1331 and 1362 jurisdiction over complaint alleging, inter alia, cession of tribal lands to state was unconscionable and for an inadequate price); Oneida Indian Nation v. County of Oneida, 719 F.2d 525, 530 (2d Cir. 1983), cert. granted, 104 S. Ct. 1590 (1984) (specifically recognizing federal common law as claim concerning tribe's possessory rights).

Since Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), and Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), the Court has repeatedly addressed the general question of what degree of sovereignty Indian tribes possess. These cases have generally arisen from regulation by the states of reservation conduct. In White Mountain Apache Tribe

v. Bracker, 448 U.S. 136, 142-43 (1980), the Court described the role of tribal sovereignty in determining whether Arizona taxing statutes could be applied to on-reservation timbering activity by a non-Indian joint venture:

> Congress has broad power to regulate tribal affairs under the Indian Commerce Clause, Art. 1, § 8, cl. 3.... This congressional authority and the "semi-independent position" of Indian tribes have given rise to two independent, but related, barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be pre-empted by federal law.... Second, it may unlawfully infringe "on the right of reservation Indians to make their own laws and to be ruled by them."... The two barriers are independent because either, standing alone, can be a sufficient basis for holding a state law inapplicable to activity undertaken on the reservation or by tribal members. They are related, however, in two important ways. The right of tribal self-government is ultimately dependent on and subject to the

> broad power of Congress. Even so, traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important 'backdrop,' ...against which vague or ambiguous federal enactments must always be measured. [Citations omitted.]

See, e.g., Rice v. Rehner, 103 S. Ct. 3291, 3294-96 (1983); New Mexico v. Mescalero Apache Tribe, 103 S. Ct. 2378, 2385 (1983); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 144-48 (1982); Montana v. United States, 450 U.S. 544, 563-67 (1981). The Court has applied analogous principles in restricting state civil jurisdiction over reservation conduct. Williams v. Lee, 358 U.S. 217 (1958); Fisher v. District Court, 424 U.S. 382 (1976).

The scope of tribal sovereignty has, moreover, been determined with respect to federal and tribal criminal proceedings in a manner consistent with the

preemption analysis used as to state regulation. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); United States v. Wheeler, 435 U.S. 313 (1978); see also Ex parte Crow Dog, 109 U.S. 556 (1883). The Court thus commented in Oliphant, 435 U.S. at 206, that "'Indian law' draws principally upon the treaties drawn and executed by the Executive Branch and legislation passed by Congress which beyond their actual text formed backdrop for the intricate web of judicially made Indian law." It is clear that the contours of tribal sovereignty must, in all contexts, be traced primarily by reference to federal law. See United States v. Wheeler, 435 U.S. at 323.

Indeed, the Court of Appeals itself noted that, under prior decisions, it had accepted federal question jurisdiction with respect to the extent of tribal

regulatory powers. See Cardin v. De La Cruz, 671 F.2d 363 (9th Cir.), cert. denied, 459 U.S. 967 (1982); Babbit Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587 (9th Cir. 1983), cert. denied, 104 S. Ct. 1707 (1984). While the exercise of adjudicatory and regulatory power may differ in form, a challenge as herein to the very right of a tribe to act focuses on the same question: Does the federally-developed doctrine of tribal sovereignty authorize the nonconsensual assertion of tribal control over tortious conduct within the reservation's exterior boundaries? The substantive issue herein is thus strikingly similar to that in United States v. Wheeler, 435 U.S. at 322: "Is [the power of a tribe to punish members] part of inherent tribal sovereignty, or an aspect of the sovereignty which has been delegated to

the tribes by Congress?" Although characterization of tribal conduct as adjudicatory or regulatory may affect the ultimate resolution of that question, it does not strip the inquiry of its quintessentially federal nature. See Pet. App. 9a (Wright, J., dissenting). The Court of Appeals' conclusory and sua sponte determination that § 1331 jurisdiction did not exist clearly raises a substantial federal question which, for those reasons stated above, has far-reaching legal and practical consequences and should be reviewed by this Court.

CONCLUSION

The amici curiae states respectfully request that the petition for a writ of certiorari be granted.

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